

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MARK COLE,

Defendant-Appellant.

UNPUBLISHED

May 26, 2011

No. 294836

Muskegon Circuit Court

LC No. 09-057724-FH

Before: CAVANAGH, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

MEMORANDUM.

Defendant entered a plea of nolo contendere to two counts of possession of child sexually abusive material, MCL 750.145c(4), and two counts of use of a computer to commit a crime, MCL 752.797(3)(d). Defendant was sentenced to prison terms of 17 months to 4 years for the child sexually abusive material convictions and 23 months to 7 years for the use of a computer convictions. Defendant now appeals by delayed leave granted his sentences for the child sexually abusive material convictions. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In a separate file, defendant also pleaded nolo contendere to two counts of second-degree criminal sexual conduct, MCL 750.520c.¹ In exchange for defendant's plea to all charges, there was to be a "five year cap on the minimum as to all charges", and the sentences were to run concurrently even though consecutive sentences were a possibility.

Defendant argues that, consistent with MCL 769.34(4)(a), he should not have been sentenced to prison for the possession of child sexually abusive material convictions. The sentencing guidelines score for this conviction resulted in an intermediate sanction cell for which a prison term generally cannot be imposed. Defendant asserts that the sentence imposed was therefore a departure from the guidelines, that no reasons were given for the departure, and that the resulting sentence was disproportionate to his conduct and prior history.

¹ Muskegon Circuit Court Docket No. 09-057782-FH. These convictions are being appealed in Court of Appeals Docket No. 298893.

Defendant ignores the plea agreement. Since he accepted a plea agreement that allowed for the sentence, he has waived the issue. *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005). Regardless,

a sentence that exceeds the sentencing guidelines satisfies the requirements of MCL 769.34(3) [allowing departures for substantial and compelling reasons stated on the record] when the record confirms that the sentence was imposed as part of a valid plea agreement. Under such circumstances, the statute does not require the specific articulation of additional “substantial and compelling” reasons by the sentencing court. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 256-258; 666 NW2d 231 (2003). [*Wiley*, 472 Mich at 154.]

Since defendant’s minimum sentence for the subject conviction was within the five-year cap, no additional reasons for a departure from the guidelines minimum range were required.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause